Cofire Paving Corporation *and* Local 175 United Plant & Production Workers. Case 29–CA–027556

September 28, 2012

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HAYES AND GRIFFIN

On December 5, 2006, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief. The General Counsel filed cross-exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings, findings, and conclusions as modified, to amend the remedy,[2] and to adopt the recommended Order as modified and set forth in full below.[3]

I. INTRODUCTION

This case concerns an employer's obligation to maintain the terms and conditions of employment when one labor organization replaces another as the employees' collective-bargaining representative. On August 8, 2005, the Board certified Local 175 United Plant & Production Workers Union (the Union) as the exclusive collective-bargaining representative of the Respondent's production employees at its Flushing, New York asphalt plant. Prior to the Union's certification, the employees were represented by Local 1175, Laborers International Union of North America, AFL–CIO (Local 1175). The complaint alleges, and the judge found, that the Respondent committed several unfair labor practices after the change in bargaining representative.

Specifically, the judge found, and we agree for the reasons set forth in his decision, that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally reducing the unit employees' vacation pay. We also agree with the judge's finding that the Respondent violated Section 8(a)(5) and (1) by its conduct regarding contributions that it previously paid to pension and annuity funds sponsored by the incumbent union, but we do not rely on his rationale. Finally, we agree with the judge's dismissal of the complaint allegation that the Respondent unlawfully implemented a new health insurance plan to replace the plan provided through the incumbent union's welfare fund, but only for the reasons set forth below.

II. BACKGROUND

For many years, employees working in the Respondent's asphalt plant were represented by Local 1175, Laborers International Union of North America, AFL–CIO. The Respondent and Local 1175 were parties to a series of multiemployer collective-bargaining agreements, the most recent of which was effective from July 1, 2002, to June 30, 2005.[4] On April 20, 2005,[5] Local 175, United Plant & Production Workers Union filed a petition to represent the Respondent's asphalt production employees. Following an election held on July 27, in which both the Union and Local 1175 were on the ballot, the Union was certified as the exclusive collective-bargaining representative of the asphalt production employees on August 8.[6]

[1] There are no exceptions to the judge's dismissal of the allegation that the Respondent violated Sec. 8(a)(5) and (1) of the Act by failing to bargain over the closing of the asphalt plant and the layoff of the unit employees.

[2] In accordance with our decision in *Kentucky River Medical Center*, 356 NLRB 6 (2010), we modify the judge's remedy by requiring that backpay shall be paid with interest compounded on a daily basis.

[3] We shall substitute a limited bargaining order for the affirmative bargaining order recommended by the judge, which is not necessary to remedy the Respondent's unilateral changes in terms and conditions of employment. See, e.g., *Ferguson Enterprises, Inc.*, 349 NLRB 617, 617 fn. 1 (2007). We shall also modify the recommended Order to comport with the Board's usual remedial provisions, to correct the unit description, and to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB 11 (2010). For the reasons stated in his dissenting opinion in *J. Picini Flooring*, Member Hayes would not require electronic distribution of the notice. Finally, we shall also modify the recommended Order to require the mailing of copies of the notice to the Union and to all unit employees employed at any time since the alleged unfair labor practices. The mailing is required because, although the Respondent had not formally closed its asphalt plant as of the hearing, it had ceased operations at the plant and laid off all of the unit employees. We shall substitute a new notice to conform to the Order as modified.

[4] Local 1175 was merged into Building, Concrete, Excavating and Common Laborers, Local 731, Laborers International Union of North America, AFL–CIO (Local 731), sometime after the execution of the 2002–2005 collective-bargaining agreement. All references herein to Local 1175 are meant to refer as well to Local 731.

[5] All subsequent dates are in 2005, unless otherwise noted.

[6] Local 1175 also represented a single shipper in a separate bargaining unit. The shipper was not eligible to vote in the July 27 election and was not included in the certified unit of asphalt production employees. The judge nevertheless found that "[a]lthough initially excluded from the unit by the Board, the parties agreed to include the shipper in[] the bargaining unit. Therefore, there were five employees in the unit during this time." The Respondent excepts to the judge's finding in this regard, arguing that the shipper was not included in the certified unit until after the backpay period ended, and thus it should not have a backpay obligation to the shipper. We find merit in the exception. The parties entered into a Stipulated Election Agreement to permit the shipper to vote on whether he wished to join the certified unit on May 24, 2006, some 2 months after the asphalt plant closed and the backpay period ended.

The collective-bargaining agreement between Local 1175 and the Respondent required, among other things, that the Respondent make payments to welfare, pension, and annuity funds sponsored by Local 1175. The agreement specifically set forth wage rates and, separately, contribution rates for each of the three funds. Upon the expiration of the agreement on June 30, the Respondent ceased making payments to the benefit funds. There is no allegation that the cessation was unlawful.

Subsequent to the Union's certification, the Union, on August 30, sent a proposed memorandum of understanding (MOU) to the Respondent and requested bargaining. The proposed MOU stated that the terms and conditions of the now-expired collective-bargaining agreement with Local 1175 would remain in effect until a new collective-bargaining agreement was reached. On September 21, the Union presented a revised proposed MOU to the Respondent, which specified that the Respondent would continue contributions in the amounts it had previously paid to benefit funds sponsored by Local 1175, but would remit those contributions to funds sponsored by the Union. The Respondent refused to sign either of the proposed MOUs. The Respondent's president, Ross Holland, testified that he did not think the Respondent could legally contribute to the welfare, pension, and annuity funds sponsored by the Union because the funds were not yet operational. In this regard, the record shows that Holland requested summary plan descriptions for the funds, but the Union did not provide them at any time during the negotiations because the plans had not yet been approved by the Internal Revenue Service.

The Union and the Respondent first met for bargaining on September 22. In attendance were Holland, Union President Richard Tomaszewski, and Union Business Manager Luciano Falzone. The discussion focused on the Respondent's financial condition. The Respondent's asphalt plant had been operating at a loss for many years, and the Respondent's milling operation had been subsidizing the asphalt operation.[7] In the 2 years preceding the election, however, the Respondent had sustained net operating losses. In addition, as a result of the decertification of Local 1175, the plan assessed pension withdrawal liability of $250,000 against the Respondent, payable over 10 years. Pointing to these factors, Holland stated that it was not economically feasible for the Respondent to continue operating the asphalt plant under the terms of the expired agreement with Local 1175.

The parties also discussed that the employees would be losing their health insurance coverage, which was provided through Local 1175's welfare fund.[8] Tomaszewski said that the Union's welfare fund was in the process of setting up a plan that would provide the same benefits as Local 1175's plan. He proposed that the Respondent contribute to the Union's welfare fund at the same rate, $3.77 per hour, that it had contributed to Local 1175's welfare fund. Holland questioned whether that amount was sufficient to provide the coverage the Union was promising. Holland believed that $3.77 per hour was too low based on his experience with both the plan the Respondent provided to its nonunion employees and the Respondent's contributions to other union welfare funds for its milling employees, which averaged approximately $7 per hour. The meeting concluded with Holland stating that he would look into alternatives to ensure that the employees would not go without coverage during the negotiations.

Shortly after the September 22 meeting, Holland learned that one of the employees' wives had been diagnosed with cancer. Around the same time, Holland was shown a COBRA letter that was sent to the employees.[9] The letter stated that the employees could continue their coverage under Local 1175's plan for 90 days. Holland concluded that the best option to ensure that the employees did not experience a lapse in coverage was for the Respondent to pay the employees' COBRA costs. To that end, he contacted Local 1175 and requested copies of the COBRA letter sent to each unit employee. Soon thereafter, however, he was informed that the offer of COBRA coverage had been withdrawn on the basis that the decertification was not a qualifying event that triggered COBRA eligibility.[10] Holland then began looking into the feasibility of adding the employees to a Blue Cross/Blue Shield plan the Respondent provided for its nonunion employees. He contacted the Respondent's insurance broker and asked whether coverage could be obtained retroactive to October 1. The broker explained that it would be possible to add the employees to the Re-

[7] Milling is the removal of the top layer of asphalt from a road prior to resurfacing. The milling operation employed approximately 40 people, and it produced approximately 70 percent of the Respondent's revenue. The asphalt operation was much smaller, employing four to six people.

[8] At the time of this bargaining session, the parties mistakenly believed that the employees' health insurance coverage did not expire until September 30. In fact, because the Respondent stopped making payments to the welfare fund after the collective-bargaining agreement with Local 1175 expired on June 30, the employees' health insurance coverage ended on August 31.

[9] The Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA) provides that employees or former employees may elect to temporarily continue health care benefits provided by an employer at group rates upon a "qualifying event," such as voluntary or involuntary separation of employment or reduction in hours. The employee ordinarily must pay for the benefits him or herself. The decertification of a union is not a qualifying event. See 29 U.S.C. §§ 1161 & 1163.

[10] See id.

spondent's plan, but a decision would have to be made quickly because it was already the middle of October and there was only a short period of time during which the benefits could be made retroactive.

The Union and the Respondent held their second bargaining session on October 21. Health insurance was the main topic of discussion. Holland offered to enroll the employees in the Respondent's plan for its nonunion employees. Tomaszewski said that he would convey the offer to the unit employees and get back to Holland. By letter dated October 31, Holland repeated his offer to the Union to place the unit employees in the Respondent's plan. He attached a summary plan description and requested that the Union respond "as soon as possible" in order to ensure that coverage could be made retroactive to October 1.

The parties held their third bargaining session on November 2. The discussion again focused on healthcare. Tomaszewski said that the unit employees thought the Respondent's health insurance plan was inferior to the plan provided by Local 1175's welfare fund. He repeated his proposal that the Respondent contribute to the Union's welfare fund, which, he said, would provide the same benefits as Local 1175's fund. Holland again questioned whether $3.77 per hour was sufficient to obtain the coverage the Union was promising. The Union failed to substantiate its claim to Holland's satisfaction, and Holland rejected the proposal. Tomaszewski then said the employees would accept the insurance offered by the Respondent, "under protest."

At the November 2 meeting, the parties also discussed the Union's proposal that the Respondent participate in pension and annuity funds administered by the Union. Holland reminded the Union of the $250,000 pension withdrawal liability that the Respondent incurred as a result of the employees' decision to decertify Local 1175, and he stated that he did not want to put the Respondent in a position where it could incur such liability again by participating in the Union's pension fund.

On November 8, Holland received a letter on what appeared to be the Union's letterhead. The letter stated: "At this time, CoFire Paving Corp. is not willing to pay into our funds for the health coverage of our choice. We are accepting the coverage offered by CoFire Paving Corp. not out of choice, but out of desperation, so our families and ourselves can have health coverage." The letter was prepared and signed by unit employees.

Following receipt of that letter, the Respondent enrolled the unit employees in its health insurance plan, with coverage retroactive to October 1. The Respondent's plan was more expensive than Local 1175's plan—$7.50 per hour versus $3.77 per hour. However, it was arguably inferior to Local 1175's plan because, among other things, it did not provide coverage for vision or dental care, whereas Local 1175's plan did provide such coverage, and copayments for prescription drugs were more expensive under the Respondent's plan.

The parties met for their fourth bargaining session on November 10. The Respondent presented a proposal for an overall collective-bargaining agreement. The proposal called for a reduction in wage rates, continued coverage under the Respondent's healthcare plan, and a 401(k) defined contribution plan to replace Local 1175's pension and annuity funds. The Union rejected the Respondent's proposal. It did not present a counteroffer at the meeting.

The parties did not meet again until March 22, 2006. The Respondent presented a revised contract proposal with even steeper cuts in wages and benefits. Holland stated that the proposal contained the terms and conditions the Respondent needed in order to continue operating the asphalt plant and, if it was not accepted, the Respondent would have to close the plant. The Union presented the proposal to the unit employees, who voted to reject it.

By letter dated March 24, the Respondent notified the employees that the asphalt plant would be closed until an agreement was reached with the Union because it was not economically feasible to keep the plant open. The letter emphasized that the Respondent was "ready, willing and able" to bargain and still hoped to reach an agreement with the Union that would permit the Respondent to operate the plant. Holland sent a similar letter to the Union.[11]

The parties held their final negotiating session on June 27, 2006. The Union offered to have the unit employees return to work under the terms of the expired agreement. It also proposed reducing staffing by eliminating job classifications and through attrition. The Respondent rejected the offers.[12]

III. THE JUDGE'S DECISION

Citing *NLRB v. Katz*, 369 U.S. 736 (1962), the judge observed that the Respondent was obligated to maintain existing terms and conditions of employment while negotiating with the Union for an initial collective-bargaining agreement. Because the existing terms and

[11] The letter to the Union stated:

> [W]e wish to continue negotiating with the Local 175 representatives and hope to come to an agreement. I am available every day next week, other than next Monday, for another negotiating session.

[12] As of the hearing, the asphalt plant had not been permanently shut down or dismantled. Holland testified that the Respondent was prepared to reopen the plant if an agreement with the Union was reached that would allow the Respondent to operate profitably.

conditions were defined by the Respondent's expired collective-bargaining agreement with Local 1175, the judge found that, with a few exceptions not relevant here, the terms of the expired agreement continued in effect as the status quo.

The judge then turned to the specific question of whether the Respondent met its obligation to maintain the status quo with respect to the welfare, pension, and annuity benefits. The judge found that the Respondent could no longer contribute to Local 1175's welfare, pension, and annuity funds because that union was no longer the legal bargaining representative of the Respondent's employees.[13] The judge also found that the Respondent was not compelled, as a matter of law, to accept the Union's proposal that the Respondent contribute to its benefit funds, citing *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970).

The judge nevertheless found that the Respondent was not entirely relieved of its obligation to maintain the status quo with respect to the welfare, pension, and annuity benefits, due primarily to the unusual bargaining history in the New York asphalt industry regarding those subjects. In this regard, the judge found that in the multiemployer negotiations with Local 1175, employers simply agreed to pay a total hourly compensation rate and did not bargain over how the compensation would be divided between take-home pay and benefit fund contributions. Local 1175, after consulting with actuaries and bargaining unit employees, decided how the compensation would be divided and then informed the employers. In light of this bargaining history, the judge determined that the welfare, pension, and annuity contributions constituted a portion of the wage scale that the employees enjoyed as of the date the Union was certified. The judge reasoned that the Respondent was required, therefore, to pay the pension and annuity contributions directly to the unit employees as wages. By failing to do so, the judge found that the Respondent unilaterally reduced the employees' wages in violation of Section 8(a)(5) and (1) of the Act.

As to the welfare fund, however, the judge recognized that paying the contributions directly to the unit employees would have put the employee whose wife had been diagnosed with cancer into the untenable position of trying to get family health insurance on an individual basis and with a preexisting medical condition. The judge therefore found that the Respondent lawfully enrolled the employees in a new health insurance plan that provided "more or less equivalent benefits" to the old plan.[14] The judge emphasized that although the new health insurance plan provided by the Respondent was not exactly the same as the old plan, it provided the employees with comprehensive family medical and hospital insurance. The judge also emphasized that the Respondent's payments under the new health insurance plan were substantially higher than under Local 1175's plan. Given these circumstances, the judge found that placing the employees in the Respondent's existing plan was "reasonable and appropriate." He therefore dismissed the allegation.

As explained below, we agree with the judge that the Respondent violated Section 8(a)(5) and (1) by its unilateral conduct regarding the pension and annuity contributions, but we do not rely on his rationale. We also agree with the judge's dismissal of the complaint allegation regarding the health insurance plan, but only for the reasons that follow.

IV. ANALYSIS

Section 8(a)(5) and 8(d) of the Act make it an unfair labor practice for an employer to refuse to bargain "in good faith with respect to wages, hours, and other terms and conditions of employment." In *NLRB v. Katz,* supra*,* the Supreme Court affirmed the Board's determination that an employer violates Section 8(a)(5) if, when negotiations are sought or are in progress, it unilaterally changes a term or condition of employment without first bargaining to impasse. Moreover, with a few exceptions, contractually established terms and conditions that are mandatory subjects of bargaining must be continued in effect as the status quo after the contract has expired until the parties negotiate a new agreement or bargain to impasse in the negotiations for a collective-bargaining agreement as a whole. *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 198–199 (1991). The existing terms and conditions continue in effect by operation of the Act; they are no longer contractual terms but terms imposed by law. Id. at 206–207 (stating that "the obligation not to make unilateral changes is rooted not in the contract but in preservation of existing terms and condi-

[13] Without analysis or elaboration, the judge stated that Sec. 302 of the Labor Management Relations Act (LMRA) prohibited the Respondent from contributing to the welfare, pension, and annuity funds sponsored by Local 1175 after that union was decertified. No party excepted to the judge's finding. In accordance with the Board's usual practice, our review of the judge's decision is limited to the issues raised by the exceptions. See *FES*, 333 NLRB 66, 66 fn. 1 (2001), enfd. 301 F.3d 83 (3d Cir. 2002). In any event, the record establishes that the Local 1175-sponsored funds would not have accepted contributions on behalf of the Respondent's employees after Local 1175 was decertified. Therefore, we do not address the Sec. 302 issue.

[14] The judge found that, while it might have been expedient, or even a good idea, for the Respondent to agree on an interim basis to participate in the welfare fund created by the Union, the Respondent simply had no legal obligation to do so.

tions of employment") (internal quotation marks omitted).[15]

The obligation to maintain the status quo includes the maintenance of fringe benefits, such as the welfare, pension, and annuity benefits at issue here. Such benefits are terms and conditions of employment that survive the expiration of the contract and cannot be altered without bargaining.[16] As the judge in this case recognized, however, it may not be possible to maintain benefits provided through union-sponsored funds following an intervening certification.[17]

The Board has not specifically addressed whether or how an employer confronted with an intervening certification is required to maintain the status quo with respect to benefit funds sponsored by the incumbent union. However, it has considered the nature of the bargaining obligation when an employer cannot maintain existing benefits owing to external circumstances. In *Christopher Street Owners Corp.*, 294 NLRB 277, 277 fn. 3 (1989), enfd. 926 F.2d 1215 (D.C. Cir. 1991), a minority union canceled the unit employees' health insurance (provided through the union's welfare fund) after the Board ordered the employer to cease recognizing the minority union and extend recognition to the proper bargaining agent. The Board affirmed the judge's finding that the employer violated the Act by failing to notify the proper bargaining agent that the insurance was canceled and by failing to bargain with that union over the impact of the cancellation on unit employees. Id. at 277 fn. 3. However, the Board disavowed the judge's statement that, "if benefit levels had been maintained so that there would not have been any discernible resultant loss to employees, Respondent's purchase of new insurance, or its acting as a self-insurer, even without bargaining with Local 32, would not have violated its bargaining obligation." Id. at 277 fn. 2. The Board stated that such "unilateral action would violate Sec. 8(a)(5)." Id.

In *Clear Pine Mouldings, Inc.,* 238 NLRB 69 (1978), enfd. 632 F.2d 721 (9th Cir. 1980), cert. denied 451 U.S. 984 (1981), the Board found that an employer lawfully ceased making payments to pension and welfare funds that would not accept contributions at the agreed-upon rate. The Board found, however, that the employer violated Section 8(a)(5) by unilaterally implementing a substitute health insurance plan without consulting with the union. In this regard, the judge found "th[e] Respondent's purchase of the Aetna plan without first consulting with the Union . . . breach[es] the *Katz* principle and constitutes a violation of Section 8(a)(5)." Id. at 80.

Similarly, in *Imperial House Condominium*, 279 NLRB 1225 (1986), enfd. 831 F.2d 999 (11th Cir. 1987), the Board found that an employer violated Section 8(a)(5) by unilaterally implementing a new health insurance plan in response to the union's demand that the employer stop contributing to the welfare plan established in the parties' collective-bargaining agreement and contribute to a new plan the union had set up in its place. The Board found that "[t]he Respondent could have acted lawfully . . . by negotiating with the Union regarding the proposed change. The Respondent could not, however, cease its contributions and establish an entirely new plan without providing the Union an opportunity to bargain over the modification in employees' terms and conditions of employment." Id. at 1227.

Although *Christopher Street, Clear Pine Mouldings,* and *Imperial House* did not arise in the context of an intervening certification, they involve similar policy considerations and are instructive. They establish that when an employer is faced with the discontinuation of existing benefits owing to circumstances beyond the employer's control, it is not permitted unilaterally to replace the benefits or to remit benefit fund contributions directly to the unit employees because doing so would be inconsistent with the statutory duty to bargain. Nor is the employer permitted to do nothing and simply allow employees to be stripped of the benefits. Rather, the employer must provide the union with notice and an opportunity to bargain over the development and its impact on unit employees.

Applying those principles here, we adopt the judge's finding that the Respondent's unilateral cessation of pension and annuity contributions violated Section 8(a)(5) and (1) of the Act, but we do not rely on his rationale. Consistent with *Christopher Street, Clear Pine Mouldings,* and *Imperial House,* we find that the judge erred in

[15] Contrary to the Respondent's arguments on exception, the law is clear that when one union replaces another as the employees' bargaining representative, the employer is obligated to maintain existing terms and conditions of employment during negotiations for a new collective-bargaining agreement. Although the contract between an employer and an incumbent union is terminated when another union supersedes it, the employer is obligated to maintain the status quo memorialized in the contract until an agreement or a lawful impasse has been reached with the new union. See, e.g., *More Truck Lines, Inc.,* 336 NLRB 772, 773 (2001), enfd. 324 F.3d 735 (D.C. Cir. 2003) ("if a challenging union is certified, then the *contract* between the employer and the incumbent becomes void, but, as usual, the employer must abide by the then existing terms and conditions of employment until such time as it reaches an agreement with the new union or a lawful impasse occurs" (emphasis in original)).

[16] *Triple A Fire Protection, Inc.*, 315 NLRB 409 (1994), enfd. 136 F.3d 727 (11th Cir. 1998) (employer violated the Act by unilaterally ceasing to make payments to pension and health funds during negotiations for a new collective-bargaining agreement); *Hen House Market No. 3*, 175 NLRB 596, 596 (1969), enfd. 428 F.2d 133 (8th Cir. 1970).

[17] Indeed, in this case, a Local 1175 fund administrator testified that the benefit funds would not have accepted contributions from the Respondent after Local 1175 was decertified.

concluding that the Respondent was required to unilaterally provide equivalent benefits or pay the contributions directly to the unit employees.[18] Instead, we find that the Respondent was required to timely notify the Union of the discontinuation of the benefits and to bargain over securing alternative benefits.

We also find that under *Katz*, supra, the Respondent was required to maintain existing contribution levels until it fulfilled its bargaining obligation. Thus, even assuming Local 1175's funds would no longer accept the contributions, the Respondent was required to continue calculating the pension and annuity contributions according to the established formulas and to set the contributions aside for the benefit of the employees until the parties reached a new agreement on the subject or bargained to an impasse. It was also required to provide the Union with notice and an opportunity to bargain over the manner in which the contributions were being preserved.[19]

The Respondent did not fail to bargain over securing alternative benefits. Thus, as of the date of the alleged unfair labor practice (October 4), the Respondent was bargaining with the Union over securing alternative benefits and had proposed replacing the pension and annuity plans with a 401(k) plan as part of its proposal for an overall collective-bargaining agreement. However, we find that the Respondent unlawfully failed to maintain existing contribution levels and to provide the Union with timely notice and an opportunity to bargain over the disposition of the pension and annuity contributions.

It is important to note that the Respondent did not continue to calculate the pension and annuity contributions owed employees or set the contributions aside for their benefit. Nor did it offer to bargain with the Union over how the contributions would be safeguarded and preserved. Rather, it simply retained the contributions for its own benefit, thereby enriching itself at the expense of the employees. By this conduct, the Respondent failed to meet its statutory bargaining obligation. Rather, it unilaterally changed the unit employees' terms and conditions of employment, in violation of Section 8(a)(5) and (1) of the Act.[20]

With regard to the welfare fund, we find, in agreement with the judge, that the Respondent lawfully permitted unit employees to participate in the Blue Cross/Blue Shield health plan that also covered the Respondent's nonunit employees. In affirming the judge, however, we rely only on the fact that the Union stated, during negotiations, that the employees accepted the insurance plan offered by the Respondent, albeit "under protest" of the Respondent's refusal to agree to the Union's proposal to have employees covered under its health benefit plan.

[18] Permitting employers to unilaterally replace benefits that have been discontinued owing to an intervening certification would undermine the new union's status as the statutory bargaining representative, as it would allow the employer to change the baseline in negotiations while the same subjects are on the table in the negotiations for a collective-bargaining agreement as a whole. Permitting employers to unilaterally remit benefit fund contributions directly to unit employees would similarly undermine the union's status (and thereby be inconsistent with an employer's statutory bargaining obligation) because the employer would, in effect, be unilaterally increasing the employees' wages and changing how compensation is divided between wages and benefits.

[19] During negotiations, the parties could agree, for example, to place the contributions in an escrow account, to deposit them in a separate bank account, or even to pay the contributions directly to the employees.

[20] Our dissenting colleague contends that the violation found "reach[es] out beyond the issues raised and litigated by the parties." We disagree, as the complaint gave the Respondent fair notice of the acts alleged to constitute unfair labor practices. It is settled that the General Counsel is not required to describe in the complaint the legal theory relied on. *Davis Supermarkets, Inc. v. NLRB*, 2 F.3d 1162, 1169 (D.C. Cir. 1993), cert. denied 511 U.S. 1003 (1994); *Pergament United Sales, Inc. v. NLRB*, 920 F.2d 130, 135 (2d Cir. 1990) (enforcing Board decision finding an unfair labor practice under a different legal theory than the one articulated in the complaint). See also *Massey Energy/Mammoth Coal*, 358 NLRB 1643, slip op. at 1652 (2012) ("the Board, with court approval, has repeatedly found violations for different reasons and on different *theories* from those of administrative law judges or the General Counsel, . . . where the unlawful *conduct* was alleged in the complaint" (emphasis in original)), and cases cited therein. Indeed, Sec. 102.15 of the Board's Rules and Regulations requires only that the complaint contain "a clear and concise description of the acts which are claimed to constitute unfair labor practices, including, where known, the approximate dates and places of such acts and the names of respondent's agents or other representatives by whom committed." Further, the General Counsel's briefs to the Board and arguments before the judge clearly put the Respondent on notice that the gravamen of the violation was that it unilaterally pocketed the pension and annuity contributions and enriched itself at the expense of the unit employees. Significantly, this is also the basis for the violation found by the judge. While we disagree with the judge that the Respondent had an affirmative duty to forward the contributions to the employees, we affirm the judge's finding that the Respondent was required to maintain the employees' overall compensation, including contributions to benefit funds, following the decertification of Local 1175, and that it violated Sec. 8(a)(5) by failing to do so without bargaining to agreement or impasse.

We also find no merit to the dissent's reliance on the fact that the Respondent could no longer contribute to Local 1175's pension and annuity funds. This misses the point, because it suggests that the Respondent therefore cannot be deemed to have changed the status quo by unilaterally pocketing the contributions. Even though there were no pension or annuity trusts to which the Respondent was required to contribute at the moment in question, the obligation to continue providing the benefits did not end merely because Local 1175 was decertified.

Our dissenting colleague further errs in contending that we are inserting ourselves into the bargaining process and finding that the Respondent should have taken a particular course of action "not agreed upon by the parties," in violation of *H. K. Porter Co.,* supra. To the contrary, as discussed below in the amended remedy section, we are requiring the Respondent to bargain with the Union over the disposition of the contributions that it owes to the unit employees.

This is not a case of consent under duress, however, because the Respondent was not obligated to accept the Union's proposal. Thus, although Tomaszewski testified that the Union never actually accepted the Respondent's health care proposal, we find that the Union objectively manifested its assent to the Respondent's proposal.

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

To remedy the Respondent's failure to pay unit employees their accrued vacation pay, we shall order the Respondent to make the unit employees whole by paying them 2 weeks of vacation pay, computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, supra.

To remedy the Respondent's unilateral cessation of pension and annuity contributions and failure to bargain with the Union over the disposition of the contributions, we shall order the Respondent to calculate the pension and annuity contributions owed the unit employees from October 4, 2005, to the closure of the asphalt plant on March 24, 2006, bargain with the Union over the disposition of the contributions, and make unit employees whole for any losses suffered as a result of the Respondent's unlawful cessation of contributions in the manner set forth in *Merryweather Optical Co.*, 240 NLRB 1213 (1979).[21]

In view of the fact that the Respondent has ceased operations at its asphalt plant in Flushing, New York, we shall order the Respondent to mail a copy of the attached notice to the Union and to the last known addresses of the unit employees who were employed by the Respondent on or after October 4, 2005, in order to inform them of the outcome of this proceeding.[22]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Cofire Paving Corporation, Flushing, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively and in good faith with Local 175, United Plant & Production Workers, as the exclusive collective-bargaining representative of employees in the following unit by unilaterally failing to pay unit employees their accrued vacation pay. The unit is:

> All full-time and regular part-time asphalt plant workers, including mixer men, repair men, grease men, welders, conveyor men, belt men, dust men, barge and boat trimmers, cleaner men, fork lift operators, Hilo operators, material yard workers and all other laborers, employed by the Respondent at the Flushing, New York facility.

(b) Failing and refusing to bargain collectively and in good faith with the Union by failing to provide notice and an opportunity to bargain over the disposition of contributions the Respondent was required to make to

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[21] Given the passage of time (6-1/2 years) since the Respondent laid off the employees and closed the asphalt plant, we recognize that the unit employees may no longer be represented by the Union. In that event, we leave to compliance the manner of payment necessary to make the employees whole for the Respondent's unilateral cessation of pension and annuity contributions.

The Respondent excepts to the judge's failure to find that it is entitled to an offset or credit against pension and annuity contributions to the extent its payments for the new health insurance plan exceeded the contributions it was required to make to Local 1175's welfare fund under the expired contract. The Board ordinarily leaves to compliance specific calculations regarding the amount of backpay due, including whether the respondent is entitled to offsets or credits for amounts previously paid. *R.P.C., Inc*., 311 NLRB 232, 235 fn. 20 (1993). We observe, however, that in determining whether a respondent is entitled to an offset or credit against backpay claims, the Board examines the nature and purpose of the payments in question. "The basic rule is that a respondent is entitled to a setoff only if the additional compensation paid the employees is equivalent to the element of backpay claimed in the specification." *Mining Specialists, Inc.,* 330 NLRB 99, 103–104 (1999) (payment for overtime work could not be used to offset payment for straight wages), enfd. 326 F.3d 602 (4th Cir. 2003); *Art's Way Vessels*, 358 NLRB 1687, 1687 fn. 4 (2012). See also *K & H Specialties Co.*, 163 NLRB 644, 648–649 (1967) (offset to regular wages permitted for regular monthly bonuses and wage payments in excess of contract rate, but not for intermittent bonuses that were not a regularly expected part of compensation), enfd. 407 F.2d 820 (6th Cir. 969), followed in *Virginia Sportswear*, 234 NLRB 315, 316 (1978) (bonuses that were discretionary and awarded on the basis of superior performance could not be used as offsets against the employer's backpay liability for contractual overtime pay, vacation pay, holiday pay, and bereavement pay); and *R & H Coal Co.*, 306 NLRB 701, 702–703 (1992) (bonuses paid to employees to reward them for extraordinary efforts to increase production could not be used as offsets against the employer's backpay liability for contractual wages), enfd. 992 F.2d 46 (4th Cir. 1993). Applying the above rule, it does not appear that the Respondent is entitled to an offset or credit for any excess health insurance premiums because such payments differ in purpose from pension and annuity contributions.

[22] Although, at the hearing, the Respondent's president, Ross Holland, testified that the asphalt plant was not permanently shut down, we recognize that the Respondent has likely ceased operations at the plant, based on the passage of time and the fact that no party has proffered evidence of the reopening of the plant. However, the parties shall be permitted to present evidence regarding this issue at the compliance stage.

pension and annuity funds sponsored by Local 1175, Laborers International Union of North America, AFL–CIO, prior to that union's decertification, and unilaterally ceasing pension and annuity contributions on behalf of unit employees.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union.

(b) Make unit employees whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful failure to pay accrued vacation pay, with interest, in the manner set forth in the amended remedy section of this decision.

(c) Calculate the pension and annuity contributions owed from October 4, 2005, to the closure of the Respondent's asphalt plant on March 24, 2006, bargain with the Union over the disposition of the contributions, and make unit employees whole for any losses suffered as a result of the Respondent's unlawful cessation of the contributions, in the manner set forth in the amended remedy section of this decision.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Flushing, New York, copies of the attached notice marked "Appendix."[23] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. Because the Respondent appears to have closed its asphalt plant, we shall also require the Respondent to duplicate and mail, at its own expense, and after being signed by the Respondent's authorized representative, copies of the notice to the Union and to all unit employees who were employed by the Respondent at any time on or after October 4, 2005.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[23] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted and Mailed by Order of the National Labor Relations Board" shall read "Posted and Mailed Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

MEMBER HAYES, dissenting in part.

The majority errs in finding that "the Respondent's unilateral cessation of pension and annuity contributions violated Section 8(a)(5) and (1) of the Act." The Respondent did not unilaterally cease contributing to the pension and annuity funds of Local 1175, Laborers International Union of North America, AFL–CIO. It was *precluded* from continuing to contribute to those funds after unit employees elected a new union, Local 175 United Plant & Production Workers (the Union), which the Board certified on August 8, 2005.[1] Simply put, after that Board certification, it was impossible for the Respondent to maintain the status quo. There was no "decision" made by the Respondent to depart from the status quo and hence no decision-bargaining obligation.

Moreover, the Respondent fully satisfied its effects-bargaining obligation. By no later than September 21—well before the complaint alleges that any unfair labor practice commenced on October 4—the Union had notice that Local 1175's pension and annuity funds would no longer accept contributions from the Respondent on behalf of workers represented by another union.[2] In a letter dated September 21, the Union noted that development and asked the Respondent to bargain over its effects.

[1] As noted by the majority, no exceptions were taken to the judge's finding that Sec. 302 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 186, prohibited the Respondent from continuing to contribute to Local 1175's benefit funds after the new union was certified. In any event, the record independently establishes that Local 1175's funds would no longer accept contributions from the Respondent on behalf of the unit employees.

[2] October 4 is exactly 6 months prior to the date on which the Union served its unfair labor practice charge on the Respondent. It is clear that the General Counsel refrained from challenging any of the Respondent's conduct prior to October 4 to avoid the possibility of a meritorious 10(b) defense. See Sec. 10(b) ("[N]o complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made.").

The very next day, September 22, the parties began bargaining. The Union proposed that the Respondent begin contributing to the Union's newly established benefit funds at the same rates it had contributed to Local 1175's funds. The Respondent rejected that proposal on several grounds, including that the Union's funds were not yet operational and that it would not be economically possible for the Respondent to continue contributing at the prior rates. The Respondent tendered a counteroffer, under which a 401(k) plan would replace the pension and annuity benefits and unit employees would receive health insurance benefits under the Company's Blue Cross/Blue Shield plan. The parties never reached agreement on replacing pension and annuity benefits, but there is no allegation that the Respondent's effects bargaining was conducted in bad faith.

Despite the impossibility of maintaining the status quo and the fact that the Respondent satisfied its effects-bargaining obligation, the General Counsel argued to the judge that the Respondent violated Section 8(a)(5) by failing to take a specific course of action: the Respondent did not secure substantially equivalent pension and annuity benefits for unit employees.[3] Deviating from the General Counsel's theory, the judge found that the Respondent violated Section 8(a)(5) by failing to remit, directly to employees, moneys equivalent to contributions that the Respondent would have been required to make to Local 1175's pension and annuity funds under the status quo. According to the judge, the status quo entailed a total hourly compensation rate for employees (the sum of hourly wages and contributions to each benefit fund) to be allocated at the discretion of the employees' bargaining representative between wages and benefit-fund contributions. Consequently, the judge found that the Respondent was obligated to offset the loss of benefit-fund contributions with direct payments to employees. As argued by the Respondent on exception, the judge erred by thus defining the status quo. The expired collective-bargaining agreement between the Respondent and Local 1175 Laborers clearly sets forth separate wage rates and contribution rates for each of the three benefit funds. The majority correctly reverses the judge and finds that the Respondent did not violate the Act by failing to remit moneys directly to employees or by failing to secure substantially equivalent pension and annuity benefits. I join that portion of the majority opinion.

In contrast, I cannot join the majority's decision to reach out beyond the issues raised and litigated by the parties and find that the Respondent violated Section 8(a)(5) by failing to take a third distinct course of action. In the majority's view, the Respondent violated Section 8(a)(5) by failing to "continue calculating the pension and annuity contributions according to the established formulas and to set the contributions aside for the benefit of employees until the parties reached a new agreement on the subject or bargained to impasse." The General Counsel did not proceed upon this theory of violation, and the parties did not litigate it. For the reasons set forth in my partial dissent in *Massey Energy/Mammoth Coal*, 358 NLRB 1643, slip op. at 1656–1665 (2012), my colleagues' insistence on reaching unalleged and unlitigated questions is contrary to the Administrative Procedure Act and fundamental principles of due process. See also *Postal Workers Local 64 (USPS)*, 340 NLRB 912, 912 (2003) (The Board should exercise "appropriate restraint by generally limiting [its] review to the issues and arguments raised by the parties.").

In any event, there is no merit to the majority's theory of violation. The majority cites not a single case in which the Board has imposed such a novel duty. The majority relies solely on *NLRB v. Katz*, 369 U.S. 736 (1962), which stands for the broad principle that the duty to bargain in good faith requires an employer to refrain from unilaterally changing employees' terms and conditions of employment.

Far from supporting the majority's novel theory, *Katz* counsels against it. The issue in *Katz* was whether an employer violated Section 8(a)(5) by unilaterally granting merit increases, changing a sick-leave policy, and instituting a new system of automatic wage increases. Id. at 740–741. The employer in *Katz* had chosen to unilaterally change the status quo terms and conditions of employment. The Court held that the employer thereby violated Section 8(a)(5), reasoning that an employer's unilateral change in terms and conditions of employment under negotiation is tantamount to a refusal to bargain in fact:

> A refusal to negotiate in fact as to any subject which is within § 8(d), and about which the union seeks to negotiate, violates § 8(a)(5) though the employer has every desire to reach agreement with the union upon an overall collective agreement and earnestly and in all good faith bargains to that end. We hold that an employer's unilateral change in conditions of employment under negotiation is similarly a violation of § 8(a)(5), for it is a circumvention of the duty to negotiate which frustrates the objectives of § 8(a)(5) much as does a flat refusal.

Id. at 743; see also *Grosvenor Resort*, 336 NLRB 613, 617 (2001) ("As the Supreme Court decided in *NLRB v. Katz*,

[3] The complaint alleges that "[s]ince on or about October 4, 2005, the Respondent has failed and refused to secure pension [and annuity] benefits for the Unit" in violation of Sec. 8(a)(5).

369 U.S. 736, 743 (1962), an employer's unilateral change in conditions of employment under negotiation is tantamount to a 'refusal to negotiate in fact.'"), enfd. mem. 52 Fed. Appx. 485 (11th Cir. 2002).

As explained above, the status quo terms and conditions of employment here included employer contributions to Local 1175's pension and annuity funds, not the creation and funding of a separate trust account for employees. Thus, the Respondent cannot be deemed to have changed the status quo. Certainly, *Katz* does not counsel otherwise. It did not involve the cessation of contributions to union benefit funds due to the impossibility of continuing those contributions, or the failure by an employer to create and fund a separate trust account. The Court's opinion does not even hint at the possibility that an employer facing these circumstances would be subject to the duty placed on it by the majority today.

Furthermore, the majority's holding constitutes an end run around the Court's later opinion in *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970). There, the Court explained that "[i]t is implicit in the entire structure of the Act that the Board acts to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties. Id. at 107–108. Here, the majority inserts itself into the parties' effects bargaining and finds that the Respondent violated the Act by failing to take a course of action not agreed upon by the parties. This, our precedent will not allow. For these reasons, I respectfully dissent in relevant part.[4]

APPENDIX

NOTICE TO EMPLOYEES
POSTED AND MAILED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

[4] I join that portion of the majority opinion that dismisses the allegation that the Respondent violated Sec. 8(a)(5) by permitting unit employees to participate in its Blue Cross/Blue Shield health plan on the ground that the Union objectively manifested its assent to such coverage. Even assuming that the Union had not consented, I would find, consistent with the judge's decision, that exigent circumstances excused the Respondent's extension of such health coverage. See *RBE Electronics,* 320 NLRB 80 (1995). Also, I join that portion of the majority opinion finding that the Respondent violated Sec. 8(a)(5) by unilaterally reducing the paid vacation benefits of unit employees by 2 weeks.

To remedy the violations found by the majority, the Order requires the Respondent to calculate the pension and annuity contributions owed the unit employees from October 4, 2005, to the closure of the asphalt plant on March 24, 2006, bargain with the Union over the disposition of the contributions, and make unit employees whole for any losses suffered. In my view, the Respondent is entitled to an offset or credit of the Respondent's $250,000 withdrawal liability, which it incurred as a result of the unit employees' decision to decertify Local 1175.

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post, mail, and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain collectively with Local 175, United Plant & Production Workers, as the exclusive collective-bargaining representative of our employees in the unit set forth below, by failing to pay unit employees their accrued vacation pay. The unit is:

> All full-time and regular part-time asphalt plant workers, including mixer men, repair men, grease men, welders, conveyor men, belt men, dust men, barge and boat trimmers, cleaner men, fork lift operators, Hilo operators, material yard workers and all other laborers, employed by us at our Flushing, New York facility.

WE WILL NOT refuse to bargain collectively with Local 175, United Plant & Production Workers, as the exclusive collective-bargaining representative of the unit by failing to provide the Union with notice and an opportunity to bargain over the disposition of contributions we made to pension and annuity funds sponsored by Local 1175, Laborers International Union of North America, AFL–CIO, before that union's decertification, and unilaterally ceasing pension and annuity contributions.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed to you by Section 7 of the Act.

WE WILL notify and, on request, bargain with the Union before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees.

WE WILL make the unit employees whole for any loss of earnings and other benefits suffered as a result of our failure to pay accrued vacation pay, with interest.

WE WILL calculate the pension and annuity contributions that we owed to unit employees from October 4, 2005, to the closure of the our asphalt plant on March 24, 2006, WE WILL bargain with the Union over the disposition of the contributions, and WE WILL make unit employees whole for any losses suffered as a result of our unlawful cessation of the contributions.

COFIRE PAVING CORP.

Linda Harris Crovella, Esq., for the General Counsel.
Richard B. Ziskin, Esq., for the Respondent.
Eric Bryon Chaikin, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. I heard this case in Brooklyn, New York, on September 19 and 20, 2006. The charge was filed on March 31, 2006, and the complaint which issued on June 30, 2006, alleged as follows:

1. That on August 8, 2005, the Union was certified in Case 29–RC–10354 as the bargaining representative in the following unit.

> All full-time and regular part-time asphalt plant workers, including mixer men, repair men, grease men, welders, conveyor men, belt men, dust operators, material yard workers and all other laborers, employed at the Flushing, New York facility.

2. That from July 1, 2002, until at least July 27, 2005 (the date of the election), the Respondent had a collective-bargaining agreement with Local 1175, Laborers International Union of North America, AFL–CIO, which was effective from July 1, 2002, through June 30, 2005, and which contained provisions requiring the Respondent to make payments to a welfare fund, a pension fund, and an annuity fund. Also, that the agreement contained a provision that entitled certain eligible employees to a 3-week paid vacation.

3. That since October 4, 2005, the Respondent has terminated payments to the welfare fund and has failed and refused to secure or attempt to secure, medical benefits that are substantially equivalent to the benefits they had previously been entitled to under the old contract. It is alleged that in this respect, the Respondent has unilaterally changed the terms and conditions of employment.

4. That since October 4, 2005, the Respondent has unilaterally changed the terms and conditions of employment by failing to secure pension and annuity benefits equivalent to those enjoyed under the old contract.

5. That since March 24, 2006, the Respondent has unilaterally changed terms and conditions of employment by failing to pay accrued vacation days to employees in accordance with the provisions of the aforementioned contract.

6. That on March 24, 2006, the Respondent laid off all of the unit employees and since that date, has paid them 1 week of vacation pay instead of the 3 weeks that they would have accrued under the old contract.

In terms of a remedy, the General Counsel stated in her opening remarks, that the timeframe that she was looking at, effectively ends on March 24, 2006, when the asphalt plant was closed. However, with respect to the plant closing and the alleged layoffs that occurred on March 24, 2006, the General Counsel contends that this took place without sufficient notice to or bargaining with the Union and that a *Transmarine* remedy should be issued. *Transmarine Navigation Corp*., 170 NLRB 389 (1968).

The Respondent, among other things, contends that:

1. On October 31, 2005, it offered to enroll the affected employees into the Company's health plan. It asserts that this offer was accepted by the Union and the employees. The Respondent claims that the substituted health care benefits were substantially equivalent.

2. That it could not unilaterally continue to make payments to the old union's pension and annuity plans after the certification and that it could not unilaterally implement any new equivalent plans without bargaining because that would have constituted a bypassing of the certified Union.

3. That the Respondent was entitled to discontinue the pension, annuity, and vacation benefits because the parties had reached an impasse. (This argument is not a particularly good one inasmuch as the Company's actions, vis-a-vis the funds, took place at the outset of negotiations.)

Based on the entire record, including my observations of the demeanor of the witnesses and after considering the arguments of counsel, I hereby make the following

FINDINGS AND CONCLUSIONS

I. JURISDICTION

The parties agree and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTCIES

Cofire has been engaged in the manufacture and sale of asphalt. It also is engaged as a contractor in the road milling business. In the asphalt aspect of its business, it has a facility in Flushing, New York, where it receives by truck, liquid asphalt (tar), sand, and gravel, which it then mixes together in a heated silo to make various grades of asphalt. The end product is then sold to enterprises, principally for roads, parking lots, etc. During the last 10 years, the asphalt plant operation has employed five to six people who have been represented by a labor union. The milling aspect of the Company's business involves the scraping off of asphalt from existing roads when they are being redone. This aspect of the Company's business has about 40 employees and has derived about 70 percent of the Company's revenues.

For many years, the employees of Cofire's asphalt plant have been represented by Local 1175, Material Yard Workers. At some point, that union was placed into trusteeship and it was thereafter merged into Local 731, Building, Concrete, Excavating and Common Laborers, Laborers' International Union of North America, AFL–CIO.

Cofire was party to multiemployer collective-bargaining agreements with Local 1175 that ran from July 1, 2002, to June 30, 2005.[1] One of these contracts covered Cofire's yardmen and the other covered one employee who was called a shipper. In any event, the yard contract also covered the employees of other asphalt companies in New York, these being Grace Industries, College Point, and Willet's Point. That agreement, among other things, provided for company payments, on behalf

[1] The agreement was made with the "members" of the General Contractors Association of New York, Inc.

of their respective employees to the Union's welfare, pension, and annuity funds.

At article V, section 1(a), the contract sets the hourly wages for each classification, effective on July 1, 2002, July 1, 2003, and July 1, 2004, by designating a portion for wages and a portion for fringes. For example, as of July 1, 2002, for repairmen, the contract states that their hourly wage is $34.11, their fringe benefits are $11.10, and their total wages and fringes are $45.21.

At article VII, section 1, the contract provides that the employer shall pay [to the Union's welfare fund], from the first day of employment, beginning as of July 1, 2002–June 30, 2005, $3.77 per hour for all hours worked by each employee up to 50 hours per week.

At article VII, section 4, the contract provides that the employer shall pay [to the Union's pension fund], from the first day of employment, beginning as of July 1, 2002, $1.43 per hour for all hours worked by each employee up to 40 hours per week.

At article VII, section 5, the contract provides that the employer shall pay [to the Union's annuity fund], as of July 1, 2002, $5.70 for all straight time hours worked by each employee, $8.55 per hour for all time and a half hours worked by each employee and $11.40 per hours worked by each employee.

At article XI, the contract provides that all employees who have been employed for 120 days within the contract year will receive 3 weeks of vacation with pay.

With respect to the three benefit funds, the testimony was that during negotiations the discussion centered on how much of a total increase should be given by the employers to the workers instead of focusing on wages and each fund contribution as a separate item. The testimony was that when a contract was made, there was, as indicated by article V, section 1, agreement that the employers would each increase the total compensation package by X percent per year. After that, the Union discussed internally with its members and with the insurance providers and actuarial consultants, how that total package should be allocated. That is, how much of the total package should be allocated to pay for health insurance, how much should go into the pension fund and how much should be allocated to the annuity fund. From the employers' perspective, this was of no concern, since their obligation was simply to pay a total amount of money per employee per hour.

With respect to the welfare fund, this fund purchased a health insurance policy from Oxford Health Care that provided hospital and medical care through a preferred provider system, with deductibles and copayments. The welfare fund also purchased a dental and optical plan to provide these types of benefits for covered employees.

The pension plan is a defined benefit plan that provides for retirement payments to employees who reach an eligibility age and who have worked a certain number of years. Employees under this plan could get full or partial pension benefits depending upon when they retired and how many years of credited service they had accumulated. Since this type of plan guarantees a defined benefit, it necessarily utilizes actuarial and investment services in an attempt to ultimately match the money coming in, by way of employer contributions, to what is paid out in the form of pensions.

The annuity plan was a defined contribution plan where the payments made by employers on behalf of individual employees would be paid in the form of an annuity to each employee upon retirement, or in certain limited circumstances, before retirement. In some respects, this plan would be similar to, but not identical to a 401(k) plan.

I note that the yardman contract requires the Employer to use six employees and to have minimum defined shifts per week. In 2003, Cofire complained that its asphalt plant operations were less efficient that those of its competitors and it asked the Union for concessions to reduce its labor costs. This is contained in a letter to the trustee of Local 1175 dated August 1, 2003, and, according to the Ross Holland, the Company's president, resulted in an oral agreement, which allowed the Company to rotate the men on a 4-day shift basis. He testified that later, in an oral agreement, the Company was allowed to work with five instead of six men when one of the yardmen retired in 2004.

These accommodations were granted by Local 1175 in recognition that Cofire was the least efficient producer among the companies that manufactured asphalt. The Union's witnesses essentially agreed with Holland that Cofire was the least efficient producer, whose labor cost per ton of product was higher than the other companies. One reason for this was that Cofire, unlike the other companies, did not have a facility abutting a waterway and therefore had to have raw materials delivered by truck and not barge. Another reason was that Cofire had older equipment that was not as productive as the equipment used by the other companies. It seems that Cofire did much of its business during the winter months when the other companies chose to close their plants for maintenance and repair during the cold weather. In more recent years, and due to warmer weather, the other companies have kept their plants running later into the winter and this has had an adverse impact on Cofire's niche business.

Local 175, United Plant & Production Workers Union was formed in 2004. Its apparent purpose was to compete with Local 1175 for the affections of the asphalt plant workers of the companies that were party to the multiemployer contract.

On April 20, 2005, Local 175 (the Charging Party) filed a petition for an election in Case 29–RC–010354. This resulted in a Decision and Direction of Election wherein an election was directed amongst the four asphalt plant workers who were then employed by Cofire. (The shipper was excluded from the unit.) At or about the same time, Local 175 filed a petition seeking an election in a multiemployer unit and filed individual petitions for the employees of each Company that was part of the Association. Thereafter, Local 175 withdrew the petition for a multiemployer bargaining unit and agreed to have separate elections conducted at each company.

On June 30, 2005, the contract with Local 713 covering Cofire's employees expired.

An election was conducted at Cofire on July 27, 2005. Both Local 175 and Local 731 were on the ballot. At the election, Local 175 received a majority of the valid votes counted and it was certified as the bargaining representative on August 8, 2005.[2] The Cofire unit was defined as:

> *Included*: All full-time and regular part-time asphalt plant workers employed by the Employer at its facility located at 120-30 28th Avenue, Flushing, New York, including mixer men, repair men, grease men, welders, conveyor men, belt men, dust men, barge and boat trimmers, cleaner men, fork lift operators, Hilo operators, material yard workers and all other laborers.[3]
>
> *Excluded*: All office clerical employees, guards and supervisors as defined In the Act.

Commencing on July 1, 2005 (*and prior to either the election or the start of bargaining*), the Respondent ceased making payments to the welfare, pension, and annuity funds that were required in the expired contract with Local 1175/731, the losing Union. The evidence does not show that the Respondent notified either union of what it was doing before it ceased making these payments.

However, because of Section 8(d) of the Act, the cessation of payments to those funds was in fact, required as of August 8, 2005 (the date of the certification), because Local 1175/731 was decertified and replaced by Local 175.

After the Respondent ceased making the payments, the moneys that it had been paying into the three funds were not distributed to the employees or otherwise used to provide any equivalent annuity or pension benefits. The health insurance benefit is more complicated and will be discussed below. Nevertheless, the affect of the initial failure to make payments to the funds, was that the health insurance coverage, previously provided to the employees would, by the terms of the old plan, terminate as of August 31, 2005. (Apparently, the parties mistakenly believed that the health insurance coverage was scheduled to terminate as of September 31, 2005.)

Bargaining between Local 175 and Cofire began in September 2005, and continued intermittently through March 22, 2006. A final bargaining session was held on June 27, 2006. Although initially excluded from the unit by the Board, the parties agreed to include the shipper into the bargaining unit. Therefore, there were five employees in the unit during this time.

Even before the commencement of bargaining, the Union, by letter dated August 30, 2005, sent a proposed "memorandum of agreement." This stated in relevant part:

> That the terms and conditions of the collective bargaining agreement previously in effect, shall remain in effect pending bargaining and the reaching of a final agreement except as otherwise agreed.
>
> That any new contract would be retroactive to August 6, 2005.

On September 21, 2005, Local 175 presented a revised memorandum of understanding. To the extent relevant, it provides:

> That the terms and conditions of the Local 1175 contract would remain in effect pending a final agreement.
>
> That any new agreement would be retroactive.
>
> That during the interim period before a final agreement is reached, that the contributions required by the Local 1175 Welfare Fund, Pension Fund and Annuity fund, shall continue but that the contributions would be paid to the United Plant & Production Workers Welfare, Pension and Annuity Funds. [I.e. to the Local 175 funds which the document represents have been duly established and jointly administered by trustees representing the union and employers in the Asphalt industry.]
>
> That the employer accepts and adopts the Agreement and Declaration of Trust creating and governing the 175 Funds as if the Employer were a Party-Signatory thereof, and accepts and adopts the Employer-Trustee named in said Agreement and Declaration of Trust as its designated Trustee. A copy of said Agreement and Declaration of Trust shall be furnished the Employer upon demand.[4]

It is noted that the proposed memorandum of understanding, either in its original form or as revised, was intended to be an interim agreement and did not purport to be a final agreement or constitute a waiver by the Company or the Union or their respective rights to bargain for what they each believed would be a suitable collective-bargaining agreement. Whether or not this proposed memorandum of understanding was a good, bad, or mediocre idea, neither side was compelled, as a matter of law, to agree to its terms. *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970).

The Company refused to sign the proffered interim agreement. Ross Holland testified that he didn't think that it was in the Company's interest to sign the memorandum of understanding, in part because he didn't think that the payments of $3.77 per hour per employee that had been allotted to the previous health plan would be sufficient to cover the costs of continued coverage for equivalent benefits.

According to Holland, he initially assumed that the employees would be entitled to continue their health insurance from the Local 1175 plan under COBRA and that he intended to pay the COBRA costs for his employees. Holland testified that he nevertheless was notified that continued coverage under COBRA was not permitted by the previous Union's fund administrator. Holland testified that given the fact that the health insurance for his unit employees was about to expire; that they could not continue that coverage under COBRA; and that there was a pending medical emergency facing at least one employee, he called up his insurance broker to investigate what options were available to him other than signing the memorandum of understanding with Local 175 and contributing to a plan that he wasn't sure was as yet fully operational. The upshot, according to Holland, was that he decided that given the circumstances,

[2] Elections also were held at the other companies and some have resulted in certifications. For at least two of those companies, Willits Point and College Point Asphalt, Local 175 has been successful in negotiating collective-bargaining agreements.

[3] Many of these classifications did not in fact exist at Cofire.

[4] The proposal to sign an interim agreement and send the money previously sent to the decertified union to the newly created Local 175 funds was a clever way of getting around ERISA and LMRA prohibitions on employers making contributions to a union in the absence of a valid collective-bargaining agreement.

the quickest and most efficacious option was to put the bargaining unit employees into the insurance plan that the Company had purchased from Empire Blue Cross/Blue Shield for its other employees. I will note here that the cost to the Company of placing the employees into the Company's plan was greater than the amount of the contributions that the Company had been making on behalf of the employees to the Local 1175/731 plan. I also note that the company plan, while not providing for dental or optical benefits, does provide for comprehensive family coverage for medical and hospitalization costs.

The first real bargaining session was held on September 22, 2005.[5] Attending for the Union were Richard Tomaszewski and Luciano Falzone. Holland represented the Company. The union representatives noted that the health insurance program that the employees had under the old contract with Local 713 was about to expire.[6] In response, Holland offered to place the bargaining unit employees, at no cost to them, into the Company's medical insurance plan that covered its other employees.

The Union's witnesses testified that at this and some subsequent meetings, Holland stated that he was putting into escrow the moneys that the Company had previously paid on behalf of the employees to the previous pension, health, and annuity plans. Holland denies that he made such a promise. In either event, I don't think that any promises made about escrow accounts is really relevant to this case and I view the whole subject as a red herring.

I also note that Union Representative Falzone testified that at this and almost every other bargaining session, Holland said that it was not economically possible for the Company to continue the terms and conditions of the previous contract with Local 1175. In this regard, Falzone conceded that Cofire's tonnage and productivity capabilities placed it at an economic disadvantage to the other asphalt companies in the New York City area.

On October 31, 2005, Holland wrote a letter to the Union and its counsel, which stated:

> When we met for negotiations on Friday October 21, 2005, one of the issues discussed was health insurance for the employees that you represent. It is my understanding that the Health Insurance coverage to which they were entitled from Local 1175 ceased on September 30, 2005 and they currently do not have any coverage. . . . I verbally offered to you to enroll the uninsured workers in our office health insurance plan with Empire Health Choice.[7] According to our broker this enrollment can be made retroactive to October 1, 2005, so that there is no lapse in coverage. When the meeting ended I was advised that the offer would be conveyed to the employees and that you would respond to this offer.
>
> As of yet I have not received a response to this offer. Without any solicitation on my part, several employees have come to me and expressed their concern to me about the lack of health insurance as their spouses are facing potentially serious and costly health issues.
>
> For your review . . . I have enclosed a copy of the summary benefits of the health insurance policy that is currently in place, and if they so elect, the asphalt plant workers can enroll in. Please present this offer to these employees and provide me the response as soon as possible. There is a limited amount of time in which the employees can be enrolled and have the coverage made retroactive to October 1, 2005.

Another meeting was held on November 2, 2005. At this time, Tomaszewski told Holland that the employees thought that the Company's health insurance plan was inferior to what they had previously enjoyed and that they wanted the Company to agree to use the Local 175 plan. When the Company refused to accept this proposal, Tomaszewski stated that the employees would accept the Company's insurance offer under protest.[8]

Soon thereafter, the Company placed the bargaining unit employees into the Company's health insurance plan and started making payments on their behalf to Blue Cross/Blue Shield. Whether or not the company's plan was exactly the same or even substantially equivalent as the previous union's plan with Oxford, the fact is that the costs for the Company were substantially higher than the $3.77 per hour per employee that the previous contract required.[9]

At a negotiation session later in November 2005, the Company presented a proposal (in the form of a spreadsheet), that called for substantial union give-backs in wages and benefits. In part, this compared a set of proposed wages and benefits to the wages and benefits that the employees had been receiving under the expired contract. In addition to calling for a reduction in wage rates, Holland's proposal called for the elimination of the pension and annuity plans and their substitution with a single defined contribution plan. (A 401(k) plan.) He also proposed that the old health care plan be replaced with a new health insurance plan at a cost of $7.50 per hour per employee. Finally, he proposed that the Company's contributions to a newly-created defined contribution plan would be increased depending upon the amount of tons of product that were produced. (I.e., based on productivity.) This was not accepted by the Union.

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[5] A brief meeting was held on September 14, 2005, but this merely was an occasion where the Union's representative, Richard Tomaszewski introduced himself to Holland.

[6] In fact both sides agree that one of the wives of the men had just been diagnosed with cancer.

[7] This plan does not offer dental or optical benefits.

[8] On November 8, 2005, the Company received a letter under what purports to be the Union's letterhead. This stated:

> We the members of Local 175 are accepting the health coverage (temporarily) offered by Cofire Paving Corp., while contract negotiations continue.
>
> At this time, Cofire . . . is not willing to pay into our funds for the health coverage of our choice. We are accepting the coverage offered . . . not out of choice, but out of desperation, so our families and ourselves can have health coverage.

[9] The evidence suggests that as of 2005, the old plan was underfunded and that under the new contract that Local 175 made with some of the other asphalt companies, more money than $3.77 per hour would have to be allocated to purchase the plan and its benefits. Also the deductible for that plan was raised from $500 to $1000 and the copays were increased.

On December 28, 2005, Union Attorney Chaiken sent a letter to the company requesting another date for bargaining. He also stated:

> Also I would like to point out that Cofire . . . has been deducting from the worker's wages and retaining in escrow sums of money normally allocated and paid over to a Union benefit fund pursuant to a collective bargaining agreement. I understand that the parties have not completed negotiations for a contract, but I need to point out that if the Employer insists on retaining the monies it is deducting from the worker's wages for welfare, pension and annuity benefits; then the Employer is holding that money as a Trustee and we consider the funds to be held I [sic] the form of a constructive trust. The money is not the Employer's money; it is the worker's money.

On March 7, 2006, Chaiken sent another letter requesting bargaining and asked what was happening to the moneys that the Employer had previously contributed to the three funds.

By a letter in response dated March 9, 2006, Respondent's counsel stated that the Respondent would resume negotiations on March 22, 2006. He also stated that the Company was "processing the Union's information request."

On March 22, 2006, a bargaining session was held at which Ziskin also appeared with Holland on behalf of the Employer. When asked where the "escrowed" moneys were, Ziskin stated that no escrow account had been established.

At the March 22 meeting, the Company presented a full contract proposal which called for substantial give backs. (Indeed, this proposal called for even steeper give-backs than had been demanded in November 2005.) This was presented by Holland as what the Company needed to get in order to remain in the asphalt manufacturing business. At one point, Tomaszewski and Falcone called the employees into the meeting and showed them the Company's offer. Although telling them that it was their decision to make and that they should sleep on it, the employees immediately rejected the proposal. Holland told the Union and the employees that this was the best offer he could make and that if it was not accepted he would close. The employees responded that they would rather be out of work than work for $20 per hour less than what they were making. They then left the meeting. But within a few minutes, one of them returned and asked if the plant was closing that night and Holland said that it was not, and that they should report "tomorrow."

Holland testified that after the March 22 meeting, he discussed the situation with his partners and they decided that if the men could not accept the reduced wage and benefit offer, they would close the plant until a future agreement could be reached. Accordingly, on March 24, 2006, Holland gave a letter to each of the employees which stated:

> As you are aware we held a negotiation meeting . . . on Wednesday, March 22, 2006 at which time we presented a comprehensive offer of wages and benefits. The union called those of you present in to advice you of our offer, which was summarily rejected within fifteen minutes.
>
> Although we are ready willing and able to continue bargaining . . ., it is not economically feasible for us to continue operating the asphalt plant until such time as we have come to an agreement with respect to wages, benefits and working conditions.
>
> Therefore at the end of business today we will be closing the asphalt plant until everything has come to a resolution. At the end of the workday you will be given your paychecks for the work performed this week as well as information about continuation of health insurance coverage.

Also on March 24, 2006, Holland sent a similar letter to Local 175's attorney. This stated:

> I have held negotiation sessions with representatives of Local 175 on October 21, 2005, November 2, 2005, November 10, 2005 and March 22, 2006.
>
> At the meeting of November 10, 2005 I presented . . . a summary proposal of wages and benefits for the employees. . . . I never received a response or counter-offer to this proposal.
>
> On March 22, 2006, I presented . . . a proposed comprehensive contract with detailed wages, benefits and working conditions. The representatives then called into our meeting those employees in the bargaining unit that were still onsite and provided them with the company's proposal. These employees took the proposal to review, returned within fifteen minutes and summarily rejected the proposal.
>
> We have determined that it is not economically feasible to continue operating the asphalt plant at this time and will be closing the plant at the end of business today. Enclosed is a coy [sic] of the letter give [sic] to employees in the designated bargaining unit.
>
> Although we are closing the plant for now, we wish to continue negotiating with the Local 175 representatives and hope to come to an agreement. I am available every day next week, other than next Monday, for another negotiating session.
>
> Please relay this request for continued negotiations to your clients.

After being advised that the plant was closed, the employees were given checks encompassing 1 week's worth of vacation. This was 2 weeks less than what was required in the expired contract and it appears that the employees, as of this date had accumulated their full entitlement to vacation pay. The topic of vacation pay was not really discussed at the negotiations and there is no dispute that the Company did not notify the Union about its decision to reduce the amount of vacation pay.

On March 27, 2006, the Union requested information supporting the Respondent's claim that it was not economically possible to continue operating the plant. In May, the Company substantially complied with this request and submitted to the Union a variety of documents including financial statements.

In June the parties met for another meeting. In pertinent part, the Union offered to have the employees work under the terms of the expired contract and Holland refused. The Union also made other concessions including a proposal that the Company could operate the plant without using job classifications. This too was rejected and Holland stuck to his last offer.

The five employees involved in this case have not returned to work. But there is a question as to whether they were laid off in conjunction with a permanent closure of the plant or if they were locked out either in response to the Employer's reasonable anticipation of a strike or in support of its bargaining position. The evidence indicates to me that the asphalt plant, which has remained closed, is nevertheless still in place and that it is fully capable of returning to operation if and when a new contract can be reached.

There have been no further meetings after June and neither side has requested any more meetings.

ANALYSIS

In the United States of America, the general rule is that an employer is entitled (within the constraints of the market), to unilaterally establish prices, wage rates, and employee benefits without the Government coming in to determine what is proper or appropriate. There are of course a variety of exceptions such as minimum wage laws; statutes that require employers pay for workers compensation insurance; and laws that require minimum safety standards in the workplace. And in times of national emergency, the Federal Government has, on a few occasions, put into effect wage and price controls. This happened during World War II and during a brief period during the Nixon administration when inflation had run rampant during a time of war. But all of these are really exceptions to the general rule.

In the field of labor relations, there are a number of circumstances where an employer is not free to unilaterally establish or change wages and benefits. Obviously, if there is a collective-bargaining agreement between an employer and a union, the terms of employment have been established through bargaining and neither side, absent consent by the other, can alter the agreed-upon terms of their contract during the life of the contract. See Section 8(d) of the National Labor Relations Act (the Act).

In situations where the employees of a company are not represented by a union but where they are seeking representation, (and where the employer is aware of the organizing activities), an employer may not grant new benefits or withdraw existing benefits as such an action is presumed to be intended to interfere with the employees' free choice in voting. In that circumstance, an employer is required to maintain the status quo. For example, an employer that grants benefits while an election petition is pending will be held to violate Section 8(a)(1) by interfering with the employees rights to select if they want representation unless it meets its burden of proof by showing that the increases either had been planned prior to the Union's advent on the scene or that they were part of some established past practice. *NLRB v. Exchange Parts Co*., 375 U.S. 405 (l963); *Baltimore Catering Co*., 148 NLRB 970 (l964); *Mountaineer Petroleum*, 301 NLRB 801 (1991).

In situations where a union has won a Board-conducted election, an employer will be barred from unilaterally changing the status quo in terms of wages and terms and conditions of employment during negotiations until and unless a legitimate impasse is reached. *NLRB v. Katz*, 369 U.S. 736 (1962). In this situation, and unlike the preceding situation where changes made during an election campaign are deemed to constitute 8(a)(1) interference with the employees' Section 7 rights to choose representation, the gravaman of the violation is Section 8(a)(5) in that unilateral changes made while bargaining is in progress is deemed to be bad-faith bargaining. The Board has noted however, that it recognizes two limited exceptions to this rule. The first is when economic exigencies compel prompt action and the second is when a union, in the context of an employer's diligent efforts to engage in bargaining, insists on continually avoiding or delaying bargaining. See *RBE Electronics of S.D., Inc.*, 320 NLRB 80, 81 (1995), and *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), enfd. 15 F.3d 1087 (9th Cir. 1994).

Essentially the same rule applies to a situation where an incumbent union is seeking to renegotiate a contract that is or is about to expire; the theory being that a unilateral change made during contract negotiations constitutes a violation of Section 8(a)(5) of the Act. Thus, an employer will be held to be bargaining in bad faith if, during negotiations, it unilaterally changed the status quo (represented by the economic terms of the expired or expiring contract). Therefore, an employer is prohibited from changing the existing terms and conditions of employment unless and until there is a valid impasse, after which the employer may (assuming that the bargaining has been carried out in good faith), unilaterally implement the terms of its final offer to the extent that it contains only mandatory subjects of bargaining. *NLRB v. Katz*, supra; *E. I. du Pont de Nemours & Co*., 346 NLRB 553 (2006); *Gloversville Embossing*, 314 NLRB 1258 (1994).

The theory underlying the concept that certain terms and conditions of employment survive the termination of a collective-bargaining agreement does not rest on the idea that the contract itself continues in force and effect. The Board, in this circumstance, has no authority to extend the duration of a contract that has a fixed term. But what it does mean is that during negotiations with a validly recognized incumbent union, an Employer may not, except after a valid impasse and consistent with its last offer, unilaterally change the wage rates or other terms of employment as they exist prior to the start of negotiations. And since the existing wage rates and terms and conditions of employment happen to have been defined by the expired contract, those terms and conditions continue in effect as the status quo. On the other hand, provisions in the expired contract such as a union-security clause, a due-checkoff authorization clause, or an arbitration clause do not survive the contract's expiration.

In situations where a successor employer purchases the operations of a predecessor that has a collective-bargaining agreement with a union, the general rule is that although the new employer may establish the initial terms and conditions of employment, it is required to notify the employees of any intended changes before hire and in the absence of such notification, it is required to maintain the existing terms and conditions as set forth in the predecessor's labor contract until such time as the parties have reached an agreement or have bargained to an impasse. *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), *Spruce Up Corp*., 209 NLRB 194, 195 (1974).

The Respondent cites to some language that I used in *Lihli Fashions Corp*., 317 NLRB 163 (1995), and *Bayshore Electrical Supply Co.* and *Amalgamated Union, Local 355*, 1992 WL

1465459. In *Bayshore,* I made this statement, essentially reiterated in *Lihli Fashions*:

> Pursuant to Section 8(d) of the Act, neither an employer nor a union may, during the life of a collective bargaining agreement, terminate, alter or modify its terms without the consent of the other party. Even after the contract expires, an employer may not unilaterally change the existing terms and conditions of employment as embodied in the expired contract, (insofar as they relate to mandatory subjects of bargaining), without first bargaining in good faith to a new agreement or impasse, unless it lawfully is discharged from its obligation to bargain; for example if the union were to be decertified or replaced by another union under the election procedures established by the Board. *W. A. Krueger Co*., 299 NLRB [914 (1990)]; *Roman Iron Works,* 292 NLRB 1292, 1293 (1989).[10]

In *Bayshore*, I concluded that because none of these exculpatory conditions existed, the Respondent's decision to terminate, during the course of bargaining, the expired contract's health insurance plan and substitute its own plan, constituted an unlawful refusal to bargain in violation of Section 8(a)(5) of the Act.

While I do not wish to retract this quotation, it seems to me that it is not applicable to the facts of this case. Here, there was an election with two unions on the ballot that resulted in the decertification of the incumbent union and which therefore relieved the Employer from any further obligation to bargain with *that particular union*. To this extent, the language in *Bayshore* accurately describes the cessation of the Employer's obligation to bargain with the previous incumbent union. But that extends only to the predecessor union and cannot extend to Local 175, which won the election and which became the substituted union, holding a newly created right to bargain.

As described above, in the context of an election campaign, the Employer could not, without violating Section 8(a)(1) of the Act, change, modify, or alter the existing terms and conditions of employment before there was a certification. That means that it could not, during the election campaign, withhold or withdraw existing benefits even though the incumbent union's contract had expired on June 30, 2005. It also means that once Local 175 became certified on August 8, 2005, the Employer could not, without violating Section 8(a)(5) of the Act, change, alter, or modify the existing mandatory terms and conditions of employment during the course of collective bargaining, until and unless the parties bargained in good faith to an impasse or until Local 175 became decertified as the bargaining representative.

I therefore conclude that the Respondent was obligated to maintain the status quo as it existed as of the certification date, (August 8, 2005); this being the wage rates and other terms and conditions of employment as represented in the contract that expired on June 30, 2005, to the extent that the Employer was legally bound to comply with those terms.

[10] I also noted that in *W. A. Krueger Co*., the Board held that even after a union has received a minority of votes in a decertification election, an employer may not make unilateral changes after a contract expired, until the Board issues its certification of results.

The next question is what was the legally binding status quo as of the certification date? To answer that question, we can first state what it was not. First, the union security, dues checkoff, and arbitration clauses in the expired contract did not survive the expiration date and therefore the Employer had no further obligation to deduct dues from its employees' wages and remit them to Local 1175/973 after June 30. Second, and more significantly, the Employer, by virtue of Section 302 of the LMRA, no longer could make payments of any moneys to any funds jointly administered by Local 1175/973 because that Union, as of August 8, 2005, no longer was the legal bargaining agent.

But that does not end the question.

In my experience in dealing with bargaining cases, the typical mode of bargaining, and the typical labor contract, treats wages and the various other benefits as discrete subjects. That is, the parties negotiate for wage increases (or decreases) and embody an agreement in contract provisions that either establish a set amount for an increase and/or a schedule of wage rates covering the various employee classifications over a period of time. By the same token, most negotiations and contracts that I have come across, tend to be the result of discrete negotiations covering a variety of subject matters and result in separate provisions for pension funds, health funds, annuity funds and other types of benefits such as vacations and holidays. This does not mean that the negotiating parties are not aware of, or do not take account of the relationship between the various parts of a possible contract and the whole. I would imagine that negotiators for each side come equipped with laptop computers with spreadsheet programs so that they each can calculate the cost of the various contract proposals and the economic benefits for the employees.

In relation to wage rates and benefit funds, the history within the New York asphalt industry has been that the predecessor union negotiated only for wage increases. As I understand the history of the expired contract (and previous contracts as well), the respective negotiators dealt only with the amount of a wage increase that would be given to each classification of employee over the lifetime of the contract. There were no employer-union negotiations over the pension plan, the welfare plan, or the annuity plan. What happened was that after the parties agreed on new wage rates, the Union went back to its membership and after consulting with them, with actuaries and with health insurance providers, decided how to split up the total wage pie so as to allocate amounts to go to each fund. So for example, if the actuary reported that it would take x amount to guarantee the defined benefit promised by the pension fund, then the Union, after discussion with the employees, would allocate X dollars per employee per hour to the pension fund. Similarly, if the health insurance provider offered to provide medical benefits at a certain level, the Union, with the employees' assent, would allocate a certain portion of the new contract wage rates for the heath plan. The same would be true for the annuity fund.

Thus, the evidence shows that as far as the companies were concerned, they simply negotiated for a new wage rate scale and did not negotiate at all on the subjects of pension, welfare, or annuity contributions. Whatever negotiations that took place on these latter subjects were internal within the Union and between the Union and potential health insurance companies. Upon agreement within the Union, the Union simply forwarded to the Employers a description of how the pie was to be sliced and the final printed collective-bargaining agreement was drawn up to conform to that result.

So, insofar as wage rates and benefit funds, what the Employers agreed to was simply a new wage scale which would be divided up, *at the Union's discretion*. One part was for an hourly take home wage and the three other parts consisted of payments that would be made to the three funds. For example, under the provisions of the expired contract, the hourly wages for repairmen, as of July 1, 2002, was $34.11, their fringe benefits were $11.10, and their total wages and fringes were $45.21. The contract required the Employer to pay to the Union's welfare fund, $3.77 per hour for all hours worked by each employee up to 50 hours per week. The contract required the Employer to pay to the pension fund $1.43 per hour for all hours worked by each employee up to 40 hours per week. And finally, the contract required the Employer to pay to the annuity fund $5.70 for all straight time hours worked by each employee, $8.55 per hour for all time and a half hours worked by each employee and $11.40 per hours worked by each employee.

The point is that the Employers did not agree to provide a pension plan or a welfare plan or an annuity plan. The bargain was that the Employers would pay a total amount of money per employee per hour and the Union would do the rest. It was to be the Union that would decide, with the employees, how to allocate the total amount of money and allocate it for different purposes.

There is no doubt in my mind that the Employer was obligated under the NLRA, to continue making those payments that it would have otherwise made to the pension and annuity funds as those amounts of money constituted a portion of the wage scale that the employees enjoyed as of the date that Local 175 was certified. Therefore, it is my opinion that the Respondent could not unilaterally reduce the employees' wages upon the replacement of the old union with the newly certified union, unless and until an impasse was reached in bargaining or until the new union was decertified.

While it is true that the Respondent was prohibited from making payments to the old Union's pension and annuity funds and had no obligation to agree to make payments to the Local 175's newly created funds in the absence of an agreement to do so, it is my opinion that the money could and should have gone directly to the employees.

I also conclude that when the employees were no longer employed as of March 24, 2006, they had, under the preexisting terms and conditions of employment, accrued 3 weeks of vacation pay. Accordingly, as this issue was not even discussed during negotiations, I conclude that the Respondent owes 2 weeks of vacation pay to the bargaining unit employees.

The health plan is a different story.

Until the certification date, the Company was obligated to contribute $3.77 per hour per employee to a fund pursuant to which the decertified Union purchased a health insurance plan from Oxford.

While it might have been expedient, or even a good idea for the Company to have agreed, on an interim basis, with Local 175's idea of making the same contributions to a newly created plan established by Local 175 for health insurance purposes, the Respondent simply had no legal obligations to do so. It legitimately could refuse to make such an interim agreement and perhaps did so because it felt that this would reduce its leverage in bargaining for a final contract.

Since the Respondent could not continue to make contributions to Local 1175's health plan and did not have any legal obligation to make equivalent contributions to Local 175's plan, it had two other options. The first option was simply to make the $3.77 per hour payments directly to each employee as part of their regular take home pay. The second option was to provide an alternative health insurance plan that would provide more or less equivalent benefits.

In the present case, the Company explored the option of providing an alternative health insurance plan, in part because one of its employees had a spouse who was diagnosed with cancer and whose treatment could not be covered under the old Union's plan because the employees could not retain their insurance under COBRA. Further, the option of simply making the payments in cash to the employees would have put the employee with the medical issue into the untenable position of trying to get family health insurance, on an individual basis, and with a preexisting medical condition.

Given the circumstances as they existed as of September and October 2005, it is my opinion that what the Company did was reasonable and appropriate. It may be that putting the employees into its own Blue Cross/Blue Shield plan was not exactly the same, in terms of covered medical services, as what the employees had enjoyed under the previous Oxford plan. But there is no question that the Company's plan, except for dental and optical benefits, provided the employees with comprehensive family medical and hospitalization insurance. Moreover, the cost to the Company was higher than what it had agreed to pay under the old contract to provide medical insurance to its employees with the decertified Union.

I therefore conclude that the Respondent did not violate Section 8(a)(5) of the Act, when in these particular circumstances, it ceased making payments to a union-sponsored health insurance plan and instead obtained an alternative medical plan for its employees at company expense.

As noted at the beginning of this decision, the General Counsel, in her opening statement asserted that the Respondent failed to bargain about the closing of the asphalt facility on March 24, 2006, and the concomitant layoff of the bargaining unit employees.

In my opinion, this assertion is not alleged in the complaint and is therefore outside the scope of this litigation. But even if it was encompassed by the complaint, I don't think that the evidence would support the conclusion that the General Counsel would like me to make.

There is no dispute that by March 22, 2006, the parties had been negotiating for quite some time, even if it was in fits and starts. There is no question but that the Company, based on its competitive disadvantage to the other asphalt plants in New York City, was seeking to reduce its labor costs and had offered a contract that would have required the five employees in this aspect of the Company's operations, to make major concessions. The evidence shows that when the Company made a contract offer on March 22, the employees unanimously rejected it.

On March 24, 2006, the Company notified the employees and the Union that it was discontinuing operations of the asphalt plant. In the letter to the employees, it stated inter alia:

> Although we are ready willing and able to continue bargaining . . ., it is not economically feasible for us to continue operating the asphalt plant until such time as we have come to an agreement with respect to wages, benefits and working conditions.
>
> Therefore at the end of business today we will be closing the asphalt plant until everything has come to a resolution. . . .

In the letter sent to the Union, enclosing a copy of the letter to the employees, the Company wrote inter alia;

> We have determined that it is not economically feasible to continue operating the asphalt plant at this time and will be closing the plant at the end of business today. Enclosed is a copy of the letter give to employees in the designated bargaining unit.
>
> Although we are closing the plant for now, we wish to continue negotiating with the Local 175 representatives and hope to come to an agreement. I am available every day next week, other than next Monday, for another negotiating session.

In essence, what we have here is not a plant closing but rather what can reasonably be described as a lockout. And as a lockout, equivalent to a strike, is part and parcel of the bargaining process (used by one side to pressure the other to accede to its demands), there is no additional legal obligation to bargain before an Employer engages in a lockout. (Such a conclusion would require an employer to first give notice and bargain before engaging in a lockout.)

CONCLUSIONS OF LAW

1. The Respondent, Cofire Paving Corporation, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 175, United Plant & Production Workers is a labor organization within the meaning of Section 2(5) of the Act.

3. That on August 8, 2005, the Union was certified in Case 20–RC–010354 as the bargaining representative in the following unit.

> All full-time and regular part-time asphalt plant workers, including mixer men, repair men, grease men, welders, conveyor men, belt men, dust operators, material yard workers and all other laborers, employed at the Flushing, New York facility.

4. That the Respondent has violated Section 8(a)(1) and (5) of the Act by unilaterally changing the terms and conditions of employment for its employees by failing to pay them, as part of their existing wages, the amounts of money that it had previously paid to a pension and an annuity plan.

5. That the Respondent has violated Section 8(a)(1) and (5) of the Act by unilaterally failing to pay its employees 2 weeks of vacation pay that they had accrued under their preexisting conditions of employment.

6. That the Respondent has not violated the Act in any other manner alleged or encompassed by the complaint.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Concluding that the Respondent was obligated, except to the extent necessitated by emergency, to maintain the existing terms and conditions of employment after Local 175 was certified by the Board, I have determined that it was required to continue to make payments to the employees that were the equivalent of the amounts that it had previously paid on their behalf to the pension and annuity plans that had existed prior to the certification date. As its bargaining obligation to Local 175 commenced on August 8, 2005, I conclude that this is when the backpay period should commence. On the other hand, the General Counsel concedes that the backpay period should end on March 24, 2006, when the Employer, at least on a temporary basis, ceased operating the asphalt plant. Any amount owed, should be paid with interest in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]